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In The Supreme Court of the United States
October Term, 1967

No.

WINN-DIXIE GREENVILLE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Winn-Dixie Greenville, Inc., by and through its undersigned counsel, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on June 2, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*. pp. la 5a) is reported at - F. 2d - , 65 L. R. R. M. 2742. The Order of the National Labor Relations Board (J. A. 1-10)[1] is reported at 157 N. L. R. B. 54.

JURISDICTION

The Decision of the Court of Appeals was rendered on June 2, 1967 and a Decree enforcing the Order of the National Labor Relations Board was entered on June 2, 1967. The Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

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[1] References to the Joint Appendix, filed in the Court of Appeals, will be through the symbol "J.A.", followed by the appropriate page number.

QUESTION PRESENTED

In their consideration of the unfair labor practice charges in this case, the Board and the Court of Appeals were influenced by the employer's apparent involvement in earlier Board proceedings and were motivated to find the employer guilty of unfair labor practices on the basis of such prior involvement in Board proceedings. The question presented is whether it is proper to apply one standard of conduct to parties who have not previously been involved in unfair labor practice proceedings and a different, less rigid standard to parties who have in the past been involved in unrelated unfair labor practice proceedings.

STATUTE INVOLVED

The applicable statute is the National Labor Relations Act, as amended, (29 U. S. C. 151, *et seq.*) Relevant portions of the Act are set forth in Appendix B, *infra*, p. 7a.

STATEMENT

A. PROCEEDINGS BEFORE THE TRIAL EXAMINER

Upon a Complaint issued by the Regional Director for the Eleventh Region, charging violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, a trial was held before a Trial Examiner of the Board on January 11, 1965. The Complaint, as amended at the trial, alleged four violations of Section 8(a)(1) and one violation of Section 8(a)(3) of the Act. (J. A. 39-42; 47). The Trial Examiner credited the testimony of the General Counsel's witnesses in connection with the 8(a)(1) charges and concluded that the facts were as alleged in the Complaint. The 8(a)(3) charge involved the alleged discriminatory discharge of one employee. The super-

visor who affected the discharge of this employee testified that the discharge was totally unrelated to any union activity. The Trial Examiner specifically credited this testimony and recommended dismissal of the 8(a) (3) allegation. (J. A. 28-29; 30-31).

The record will reflect that no evidence of prior Board proceedings, involving this employer or otherwise, was produced at the trial or incorporated in the record reviewed by the Board.

B. THE BOARD'S DECISION

The Board adopted that portion of the Trial Examiner's intermediate report which dealt with the 8(a) (1) allegations and found that the Company had on three occasions violated Section 8(a)(1) of the Act. However, the Board reversed the Trial Examiner's intermediate determination that the discharge was not in violation of Section 8(a)(3) of the Act. In doing so it reasoned that it was not interfering with the Trial Examiner's credibility determination, but rather it was merely drawing a contrary inference from undisputed facts. (J. A. 4 n. 6) The Board found that the Company "clearly disclosed its union animus" by virtue of the three 8(a)(1) violations it found in this case, the Company's employee handbook, which was not part of the record before the Board, and what the Board characterized as "repeated manifestations by this Company of its disregard for the statutorily guaranteed rights of its employees at Greenville and elsewhere." (J. A. 4 n. 4) Following this statement the Board listed citations to Board and Court of Appeals proceedings involving *Winn-Dixie Stores, Inc.* but referred to no previous case involving this respondent. Moreover, none of these cases was mentioned at the hearing and they were not, in any sense, evidence in the record.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals for the Fourth Circuit granted enforcement of the Board's Order in all respects. Preliminary to its discussion of the issues in the enforcement proceedings, the Court made the observation that "[t]he Company's opposition to union organization is a matter of record." (App. 2a). Thereupon the Court also enumerated in its Decision the earlier Board and Court of Appeals cases involving *Winn-Dixie Stores, Inc.* The Court analyzed the allegations in this case "[a]gainst the background of this Company's hostility to unionization." (App. 4a). It ultimately concluded that, in view of this background, the conduct in question went beyond permissible limits and was therefore violative of the Act.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals to the effect that a party's involvement in earlier unfair labor practice proceedings is a factor which may properly influence a determination as to whether later conduct is violative of the Act is contrary to this Court's Decision in *N. L. R. B. v. Walton Manufacturing Co.*, 369 U. S. 404, 49 L. R. R. M. 2962 (1962), in that such holding establishes a special rule for evaluating evidence in cases where a party has in the past been found guilty of violating the Act and thereby establishes a double standard for determining if substantial evidence exists to support a finding of violation.

1. In the *Walton* case the Court reviewed a practice or rule of the Fifth Circuit Court of Appeals by which the Court applied one test for determining if substantial evidence supported Board findings of 8(a)(1) violations and a different, more exacting test for determining if 8(a)(3)

findings were supported by substantial evidence.[2] The Court rejected this double standard notion upon the ground that "[t]here is no place in the statutory scheme for one test of substantiality of evidence in reinstatement cases another test in other cases."[3]

Just as there is no place in the statutory scheme for a different test of substantiality of the evidence in reinstatement cases, as opposed to other cases, there is likewise no place in the statutory scheme for a different test of substantiality in cases where a party has previously been involved in unfair labor practice proceedings, as opposed to cases in which a party has not. The application of a double standard for evaluating evidence to determine if it is substantial, an approach to judicial review which this Court rejected in *Walton*, has been resurrected in the instant case and will reappear with increasing frequency if not sooner abolished by this Court.

a. It has long been the rule that a showing of unlawful and anti-union motivation is normally essential to finding a violation of Section 8(a) (3) of the Act.[4] *American Shipbuilding Co. v. N. L. R. B.*, 380 U. S. 300 (1965); *N. L. R. B. v. Brown*, 380 U. S. 278 (1965); and *Radio Officers Union v. N. L. R. B.*, 347 U. S. 17 (1954). These cases appear to hold that the unlawful motivation may be inferred from the nature of the act under scrutiny or from other evidence in the record. But in this case neither the Board nor the Court of Appeals limited itself to a

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[2] The double standard was established in the earlier case of *N. L. R. B. v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433 (5th Cir. 1941).

[3] Citing *N. L. R. B. v. Pittsburgh S. S. Co.*, 340 U. S. 498 and *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474.

[4] There has been no contention that we are here dealing with inherently discriminatory conduct of the variety encountered in *Erie Resistor Corp. v. N. L. R. B.*, 373 U. S. 221 (1963).

survey of the evidence; both went beyond the record to consider earlier proceedings and at least in part derived from the earlier cases the essential element of union hostility. The inevitable effect of this practice is to place the employer on a different plane and accord him disparate treatment *vis a vis* other employers who happen not to have been involved in earlier proceedings before the Board.

b. The unequal treatment accorded the employer herein was not limited to the 8(a)(3) finding. The earlier cases were very clearly a factor in the Court's evaluation of the 8(a)(1) findings. The Court specifically noted that, in view of the background information derived from these earlier cases, the conduct alleged to be in violation of Section 8(a)(1) did indeed transcend the bounds of propriety and was in violation of the Act.[5]

c. The National Labor Relations Act sets forth a standard of conduct to be followed and draws no distinc-

[5] It should be noted that we are not here dealing with the variety of background evidence which may properly be received for the purpose of clarifying factual matters which are presently under consideration. To begin with the earlier cases were not referred to at the trial. To the extent that their existence or content was considered by the Board and the Court of Appeals, the consideration was of matters beyond the record in the case. Secondly, none of the earlier cases in any way clarified or shed light upon the allegations or findings in this case and there is no suggestion in either the Board's Decision or the opinion of the Court of Appeals that the facts in the earlier cases served to illuminate any factual matter under consideration here. This background was not resorted to for purposes of clarification, but to furnish a basis upon which to find the present conduct was unlawful. In *Local Lodge* 1424 *v. N. L. R. B.*, 362 U. S. 411 (1960) the Court condemned this very practice of resorting to background evidence, not to clarify a matter under consideration, but to furnish a basis for finding a present violation of the Act. While the discussion centered around interpretation of the six month period of limitations provided for in the Act, the case is clearly indicative of the restraint which must be exercised when remote events are relied upon to establish present violations of the Act.

tion between those who have previously strayed from the prescribed path and those who stand accused of their initial transgression. Implicit in the omission of any such distinction is the recognition that to allow previous cases to achieve the importance they were given here is to inject an element of prejudice which may well, albeit unconsciously, substitute for the proof needed to render evidence substantial. Not only may prejudice result from a lessening of the quantum of evidence required in order to be substantial, such a practice fails to allow for a change in either policy or personnel, or both. Such changes do occur and it would be inequitable to allow a current evaluation to be controlled by all that has gone before and surround the deliberations with an inference of guilt derived from earlier practice or the attitude of predecessors.

d. The sort of illogical and unfair results which may be expected to follow from undue reliance upon earlier cases is amply revealed in this case. To support the required finding of unlawful motivation behind the discharge, and in evaluating the conduct alleged to violate Section 8(a)(1), the Court of Appeals cited earlier cases from other Circuits involved a different corporate entity. Even if one indulged in the seemingly sound assumption that some connection exists between that Company and the one involved here, there is nothing in the record upon which to base the further assumption that the two corporations pursue a common labor policy. On the contrary, if the Court of Appeals had pursued further its practice of allowing findings in other cases to influence its evaluation of the evidence in this one, it would have had to conclude that the second assumption is not sound at all. One of the cases which influenced the Court of Appeals was that of *N. L. R. B. v. Winn-Dixie Stores, Inc.*, 361 F. 2d 512 (5th Cir. 1966), the opinion in which clearly points up the ad-

ministrative and policy making autonomy of the various corporate divisions of the Company. Thus, even the background resorted to by the Court of Appeals negates the suggestion that these earlier cases would furnish anything useful to a consideration of the allegations in this case.

e. Not only is the double standard notion contrary to the statutory scheme, it also runs afoul of traditional notions of what may properly be shown to establish violation of a statute. The theory which admits of consideration of prior unrelated offenses as evidence of guilt, or as something which alters the burden of proof, finds no counterpart in our jurisprudence.

With the ever increasing volume of cases being decided by the Board and undergoing review by the Courts of Appeal, it is essential that this Court prescribe the limitations which must attach to the role of earlier cases in the processes of deliberation and review.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted.

HAMILTON & BOWDEN

By _____
(O. R. T. Bowden)

By _____
(Robert C. Lanquist)

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,091.

National Labor Relations Board,
Petitioner,

versus

Winn-Dixie Greenville, Inc.,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued May 3, 1967. Decided June 2, 1967.)

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

Janet Kohn, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Warren M. Davison, Attorney, National Labor Relations Board, on brief) for Petitioner, and Robert C. Lanquist (Hamilton & Bowden on brief) for Respondent.

CRAVEN, Circuit Judge:

This is a petition to enforce an order of the National Labor Relations Board requiring Winn-Dixie to offer job reinstatement and make whole one J. L. Smith, and to cease and desist from coercively interrogating employees concerning their union activities and from threatening employees with reprisal for union activity or support.

Until recently, none of Winn-Dixie's grocery supermarket employees (some 18,000 of them) had ever been represented by a labor union.[1] The Company's opposition to union organization is a matter of record.[2] The Board and the Examiner found the Company was always "constantly on the alert to detect signs of union activity by its employees."

As early as autumn 1962, and again in June 1964, management personnel called Smith to the office to question him. A company vice-president was found to have said to him, "What the hell is this I hear about you singing up drivers?" Later a delivery superintendent accused Smith of being "dissatisfied" with his job and of signing up drivers. Upon Smith's denial (found to have been true at the time made), the superintendent remarked, "[i]t was just grapevine stuff," and said to forget about it. Thereafter, Smith *did* sign up about twenty of the eighty-nine drivers. His union activity lasted about six weeks. On August 14, 1964, he

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[1] On November 4, 1964, General Drivers, Warehousemen and Helpers Local Union No. 509, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, won an election in a unit of truck drivers at the Greenville, South Carolina, warehouse by a vote of forty-five to forty-four.

[2] *See, e.g., Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788, *enforced*, 361 F.2d 512 (5th Cir. 1966); *Winn-Dixie Stores, Inc.*, 143 *N. L. R. B.* 848, *enforced*, 341 F.2d 750 (6th Cir. 1965); *Winn-Dixie Stores, Inc.*, 138 N.L.R.B. 1355, en- F.2d 750 (6th Cir. 1965); *Winn-Dixie Stores, Inc.*, 138 N.L.R.B. 1355, *enforced*, 324 F.2d 502 (5th Cir. 1963), *on contempt*, 353 F.2d 76 (5th Cir. 1965).

was discharged and told by the superintendent that the time had come for his departure. The company urges that violation of various rules and general unsatisfactory attitude caused the discharge.

Although the Trial Examiner noted that the Company's opposition to unionization of its employees is "unconcealed," he found that Smith was "spontaneously" discharged by the superintendent because of what he termed a trivial and petty episode involving Smith's failure to remove a few banana blankets from his truck. The Trial Examiner concluded that since a spate of prior reprimands were all issued before the union campaign began they could not be connected with Smith's union activities and served to justify the "spontaneous" discharge.

The Board accepted the subsidiary factual findings of the Trial Examiner, but rejected this reasoning, noting that Smith was a ten-year employee with a record of no formal reprimands until a few months before the election. The Board concluded that the most reasonable inference to be drawn from the record as a whole was that Smith was unlawfully discharged because of his union activities and that the reasons asserted by respondent were fictitious. The Board was influenced to reject the Examiner's inference by the latter's finding that the Company had attempted to bolster the discharge with fictitious reasons and had put into Smith's file written reprimand slips which had never been shown him. A careful analysis of the evidence is contained in the Board's decision and order.[3]

During the organization campaign, in early August 1964, assistant delivery superintendent Miller queried driver William Green about the Union. When Green denied he had been contacted by anyone about the Union, Miller ob-

[3] 157 N.L.R.B. 54.

served, "don't guess they will knowing the way that you feel about it."

Against the background of this Company's hostility to unionization, we think the inquiries made to Green by Miller cross the line from permissible inquiry to coervice interrogation forbidden by the Act. *See Daniel Construction Co. v. NLRB*, 341 F.2d 805, 812 (4th Cir. 1965); *NLRB v. Overnite Transportation Co.*, 308 F.2d 279, 281 (4th Cir. 1962); *NLRB v. Lester Brothers, Inc.*, 301 F.2d 62, 65-6 (4th Cir. 1962).

The Company urges that the Board deviated from established principles of law in rejecting the Trial Examiner's finding that Smith was discharged for valid reasons unconnected with his union activities or sentiments. We think not. "The fact that the Trial Examiner may have reached a different conclusion on some of the questions involved, while a matter for our consideration along with other matters in the record, does not mean that the findings of the Board on these questions are not to be upheld if supported by substantial evidence on the whole record." *NLRB v. Thomason Plywood Corp.*, 222 F.2d 364, 365 (4th Cir. 1955). The Supreme Court has specifically rejected the contention that the findings of an examiner of an administrative agency "based on demeanor of a witness are not to be overruled by a Board without a 'very substantial preponderance in the testimony. * * * '" *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955).

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951), the Supreme Court said, with reference to the relationship between the Labor Board and its Trial Examiners: "The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an Examiner's findings only when they are

'clearly erroneous'." Rule 52(a) of the Federal Rules of Civil Procedure does not apply to the review by administrative agencies of the findings of examiners.

Enforcement Ordered.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 11,091.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WINN-DIXIE GREENVILLE, INC.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against respondent, Winn-Dixie Greenville, Inc., Greenville, South Carolina, its officers, agents, successors and assigns on the 14th day of March, 1966, in a proceeding before said Board known upon its records as Case No. 11-CA-2510; upon the answer of the respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and the same hereby is, enforced, and that the said Winn-Dixie Greenville, Inc., Greenville, South Carolina, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended, (29 U.S. C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *